Supreme Court, U.S.
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No. 99-312

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as
Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Respondent respectfully submits this Supplemental Brief to address a new argument and a new piece of non-record material raised for the first time in Petitioner's Reply Brief. *See* S. Ct. R. 25.5.

* * * *

Petitioner contends for the first time in its Reply Brief that "it is often the case that a diagnostic team has studied a crossing in *prior* years and determined that active devices are unnecessary," citing as supposed support for this proposition a letter written by the Tennessee Department of Transportation ("TDOT") in 1983 (Petr's Supp. Lodg. Tab C, Exh. 6) regarding the Oakwood Church Crossing. Reply Br. 10. Petitioner never made this argument, or cited to this document, at any time in this litigation prior to filing its Reply Brief. Nor is that surprising. The letter provides no support for the claim that diagnostic teams regularly study crossings other than under the hazard program, and the testimony in this case (which Petitioner fails to discuss) proves exactly the opposite. *See* Resp. Br. 31-36.

Moreover, contrary to Petitioner's representation in its Reply Brief, this letter is not even part of the record in this case. Petitioner cites the letter correctly as an exhibit (No. 6) to the second day of the deposition of Terry Cantrell, but is wrong in representing that the exhibit or this portion of the Cantrell deposition is part of the record. Except for isolated excerpts not relevant here, only the transcript of the first day of the deposition (May 3, 1995) and exhibits from that day were made part of the record. *See* JA 7 (docket entry no. 52 (record also on file with this Court)). The evidentiary status of the letter is important because Petitioner may be attempting obliquely to challenge the district court's finding that "there is no evidence in the record that the Oakwood Road crossing was the subject of a study by a diagnostic team" and that "there is no evidence in the record that there were specific determinations that such passive warning devices were adequate for particular

crossings." Cert. App. 35a, 36a. Presumably, Petitioner never attempted to prove the contrary through this letter because, as the Solicitor General's brief explains, States act as the federal government's agent only when upgrading crossings to include active warning devices under the hazard program. Br. of United States 11 (installation of active devices under hazard program "supplant[s] with a federally prescribed decisional process the crossing-specific determinations of adequacy normally made by *a state official* or a jury in a state-law tort suit" (emphasis added)), 21 (same). The diagnostic team evaluation referenced by the letter, by contrast, was done solely by TDOT at the request of a Congressman, and thus does not represent a *federal* action of any kind.

Even if the Court were to consider this non-record material, it supports *Respondent's* description of the hazard and minimum protection programs. The letter is a response to a April 27, 1983, inquiry from a Congressman (also not part of the record but nonetheless lodged by Petitioner, *see* Petr's Supp. Lodg. Tab C, Exh. 5) stating that the railroad that owned the crossing at the time wished to install lights but would not do so because of the cost. The railroad had asked the Congressman to contact the TDOT "to see if the crossing light could be funded through the grade crossing program," *i.e.*, the hazard program. Jones specifically recognized "that the installation of crossing lights are [sic] funded on a priority basis," and asked TDOT to "please review this particular crossing to determine its priority." TDOT responded *not* that the crossing did not merit advanced warning devices, but instead that the crossing was not high enough on the priority list to qualify for the limited available federal funding. The "diagnostic team investigation" revealed that "[t]his crossing does not have sufficient train/vehicle exposure to *qualify* for active warning devices (lights, bells, etc.), nor is there a sight-distance problem at the

crossing" (emphasis added). Instead, "[t]he crossing will be upgraded with passive 'Railroad Advance Warning' signs, *pavement markings*, etc. in the Department's ongoing program for *minimum grade crossing protection* which is underway state-wide" (emphasis added).

This exchange of letters is proof of Respondent's description of the hazard and minimum protection programs in several respects.

1. The letters establish that States upgrade crossings under the hazard program based on the availability of limited federal funds, *not* based on a determination that the crossings not to be upgraded are adequately protected with minimum protection devices. TDOT's response explains that federal funds were being allocated to crossings that the State's computer ranking indicated were more dangerous, not that the Oakwood Church Crossing did not need lights and gates or that, if more funds were available, the State would not install advanced protection. *See also* Affidavit of Alvin Zager, Exh. 3 to May 3, 1995, deposition of Terry Cantrell (docket entry no. 52) (explaining that it was the limited amount of federal funds that determined the number of crossings upgraded each year under the hazard program).

2. Railroads remained free to install advanced devices with their own funds at crossings not upgraded under the hazard program, as Petitioner's predecessor considered doing at the Oakwood Church Crossing. (Indeed, the letter strongly suggests that the railroad that owned the crossing at the time, Petitioner's predecessor in interest, recognized that the crossing was dangerous and merited advanced protection.)

3. The minimum protection program is a separate

initiative under which no determination of adequacy was made. TDOT's letter clearly distinguishes between the hazard program under which crossings were upgraded through the use of limited federal funds (which was the subject of the Congressman's inquiry) and the minimum protection program (which TDOT stated would be utilized in installing passive warning devices).

4. To the extent the letter does set forth what is necessary to protect the crossing, it identifies a warning device – "pavement markings" – that, as discussed in Respondent's Brief at 20-22, were required but not installed.

5. The letters demonstrate that the mere installation of minimum protection devices does not give rise to preemption because changed conditions, such as increased traffic volumes and reduced sight distances as a result of construction or the growth of vegetation, can render a crossing substantially more hazardous over time. Notwithstanding TDOT's representations in the 1983 letter, minimum protection devices were not installed at the Oakwood Church Crossing until 1987 (except for pavement markings which were never installed), and the accident in this case did not occur until 1993. It is not surprising that in the decade between the State's review of the crossing and the accident, conditions at the crossing became "ultrahazardous," as the trial testimony established. *See* Resp. Br. 12.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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